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# In The Supreme Court of the United States

October Term 1995

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**BRENDHAN B. HARRIS,**
*Petitioner*

v.

**THE CITY OF VIRGINIA BEACH, et. al.,**
*Respondents*

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On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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## AMICUS CURIAE BRIEF OF SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE THE ATTACHED AMICUS CURIAE BRIEF

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J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

No. 95-1380

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McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
*Counsel of Record

## MOTION FOR LEAVE TO FILE ATTACHED AMICUS BRIEF

Now comes the Southern States Police Benevolent Association (hereafter SSPBA) and respectfully moves this Court pursuant to Rule 37 for leave to file the attached amicus curiae brief in support of Petitioner Harris' Petition for a Writ of Certiorari.

SSPBA sought consent of the parties to file a brief in support of Petitioner's petition for a writ of certiorari. Petitioner consented, however, Respondent City of Virginia Beach refused consent therefore necessitating this motion.

SSPBA seeks to present the attached short amicus curiae brief because the Fourth Circuit decision below and the issues involved are vitally important to SSPBA's members and law enforcement officers throughout the country.

## INTEREST OF SSPBA AS AMICUS CURIAE

SSPBA is a non-profit association comprised of over twenty thousand law enforcement officers and related public employees in ten southern states including Virginia. SSPBA and their members are vitally interested in the grave constitutional issues before this Court because traditional First Amendment protection is critically necessary in order to safeguard the interests of officers from retaliatory job termination. Law enforcement officers like petitioner Harris frequently suffer reprisal from whistleblowing about corruption within police agencies as in the case *sub judice*. SSPBA and its members and millions of public employees would be severely jeopardized and their speech dangerously chilled if the judgment and opinion below were to stand.

The tremendous volume of often conflicting reported cases addressing free speech issues in public sector work-

places demonstrate the magnitude of retaliation from unpopular speech and the divergent approaches of various circuit courts in public employee free speech jurisprudence. This case presents the Court with an opportunity to clarify the law in this confusing area and provide guidance for the lower courts in: 1) how to analyze the context of speech including the speaker's motivation, 2) how to balance content of speech of high public concern, and 3) how to factor in disruption as a component of the constitutional balancing test.

SSPBA vehemently submits that the continued right to free speech by law enforcement officers, as historically recognized by this Court, is perhaps the most important component of maintaining integrity in the law enforcement workplaces of America. SSPBA accordingly seeks to submit a short amicus curiae brief to assist this Court in its consideration of this important case.

In addition to the foregoing reasons, the accompanying SSPBA amicus brief offers additional grounds and additional cases supporting the acceptance of certiorari. The additional grounds offered are important for law enforcement officers everywhere.

SSPBA has previously appeared as amicus curiae before this Court and numerous other courts in law enforcement litigation.

WHEREFORE, SSPBA respectfully prays that this court grant leave to file the accompanying amicus curiae brief.

J. Michael McGuinness*
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## QUESTIONS PRESENTED

1. Whether a law enforcement officer's sworn testimony before a magistrate constitutes protected speech on a matter of public concern where the speech reported criminal offenses by a police lieutenant and the magistrate found probable cause that the police lieutenant had committed criminal offenses?

2. Whether and to what extent should the motivation of a whistleblowing employee be factored into the constitutional balancing test involving content, form and context in determining if speech by a public employee is of public concern and protected?

3. Whether whistleblowing speech exposing official public corruption and illegality is of such important public concern that such speech should be protected regardless of the motivation of the speaker?

4. Of the several conflicting circuit court approaches to constitutional interest balancing in public employee free speech cases, which approach best implements this Court's holding and rationale in *Rankin v. McPherson*, 483 U.S. 378 (1987) and affords appropriate protection for speech?

5. Whether the Fourth Circuit opinion below improperly affords undue weight to a speaking employee's motivation and potential disruption therefore suppressing speech which reported corruption by a senior police official?

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## INTEREST OF THE AMICUS CURIAE

Amicus Curiae SSPBA incorporates by reference the Interest of the Amicus Curiae from the foregoing motion.

## STATEMENT OF THE CASE

SSPBA adopts the Statement of the Case and Facts as presented by Petitioner.

## SUMMARY OF ARGUMENT

The speech and expressive conduct of Petitioner Brendhan Harris must be protected by the First Amendment because his speech touched upon a matter of critical public concern: whether a police lieutenant committed criminal offenses and/or engaged in corruption.

In his authoritative treatise, Senator Sam J. Ervin, Jr. explained how "First Amendment freedoms are often grossly abused." Ervin, Preserving The Constitution (1984). Senator Ervin observed that "free speech is in mortal danger in America." *Id.* at x. Petitioner's firing for merely testifying as law enforcement officers are required demonstrates the wisdom in Senator Ervin's analysis.

The position adopted by the Fourth Circuit below herein would have dedicated law enforcement officers turn a deaf ear to criminal conduct and/or corruption within their agencies. Turning a deaf ear on criminal conduct of a police lieutenant could lead to evisceration of the rule of law, a prospect that this Court should not risk. Remaining silent in this context would offend ethical and professional obligations of police officers. Most profesional law enforcement agencies require officers to immediately report criminal conduct of fellow officers. Consequently, the First Amendment not only protected Petitioner's right to communicate, but sound public policy also encouraged his communication and testimony.

Since this Court's last treatment of the free speech rights of law enforcement officers in *Rankin v. McPherson*, 483 U.S. 378 (1987), circuit courts have taken very divergent approaches in implementing the constitutional interest balancing test enunciated by *Rankin* and its antecedents. This Court should grant the petition to resolve the circuit court conflict.

## REASONS FOR GRANTING THE WRIT

For generations, this Court has vigilantly protected the free speech and associational rights of public employees like Harris. E.g., *Rankin v. McPherson*, 483 U.S. 378 (1987)(affording free speech protection to employee in law enforcement agency who remarked about an assassination attempt on President Reagan; Court found speech was of public concern and therefore protected); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and their many antecedents.

Speech relating to public concern has been defined by this Court as any speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The Fourth Circuit's holding and rationale in this case eviscerates these principles.

## THE FOURTH CIRCUIT'S APPROACH BELOW IS INCONSISTENT WITH THE MAJORITY CASES THAT ELEVATE CONTENT OVER CONTEXT IN CONSTITUTIONAL INTEREST BALANCING IN PUBLIC EMPLOYEE FREE SPEECH CASES.

The dissent by Senior Judge Heaney well outlines the reasons why this Court should grant the writ. See slip op. at 16 - 22. The circuit court conflict in the balancing test is well identified therein.

SSPBA has encountered countless cases where trial courts have taken divergent approaches in applying this Court's balancing tests from *Rankin* and *Pickering*. This is especially troubling because the difference in the approaches appears outcome-determinative.

The Fourth Circuit's approach erroneously elevates **context** over the **content** of the speech in the constitutional calculus. The Fourth Circuit's approach in this case was erroneous because the court's analysis required that in order for pub-

lic employee speech to be protected, the employee must be "acting as a public citizen concerned with police corruption, as opposed to acting as a police officer embroiled in a personnel dispute." Slip. op. at 10.

Under the Fourth Circuit's approach, two polar extremes are presented: either one is speaking as a citizen or an employee. That approach is untenable for several reasons. First, it eliminates the most common scenarios that necessitate First Amendment protection: an employee who has learned of some wrongdoing that must be reported so that the rule of law can be preserved. It makes no constitutional or common sense for an employee to go home and change his hat, return to the workplace purportedly as "a citizen" and then articulate speech which would be protected. The Fourth Circuit's approach places un undue and unworkable emphasis upon attempting to glean the employee's motivation, a problematic task in any event. Observations of corruption often makes good cops motivated to speak out against the corruption.

The most important point in free speech analysis is whether the speech involves matters of public concern. Public spirited speech can just as easily arise from an employee as from a citizen. In fact, public employees are in the best position to know when public officials are committing fraud and malfeasance as in this case. Public employees, especially law enforcement officers, are taught to report misconduct. It seems un-American to condone retaliation with such severe injuries as job termination where public employees act in accordance with their training to report wrongdoing.

The Fourth Circuit's approach is untenable because it essentially predetermines the outcome of the controversy based upon a fictional decision of "which hat is worn" when the employee speaks. The Fourth Circuit's approach is also untenable because it ignores the fact that there are often "mixed motives" underlying the speech and conduct of police officers and others. Even if an officer is personally motivated, he may still be professionally motivated

A topic otherwise of public concern does not lose its importance merely because it arises in an employee dispute. *Hall v. Ford*, 856 F.2d 255, 260 (D.C. Cir. 1988); see cases cited in Petition. Under the Fourth Circuit's approach, if a police officer has an ongoing personnel dispute, police management is virtually immunized from suit for retaliation. Even if there is an ongoing personal or personnel dispute, ethical law enforcement officers must not turn a deaf ear on corruption.

The Fourth Circuit, after reviewing a cold record, has reversed the trial court who heard the evidence, observed the witnesses and was in the best position to ascertain motivation and credibility. Under the Fourth Circuit's approach, an appellate court is free to usurp the trial court's role in assessing the motivation of the speaking employee. These motivational determinations are best left to the trial court.

**The Content of Petitioner's Speech Compels Protection**

Of the three factors to analyze (content, form and context of speech), the Circuit courts have held that the "content, subject matter, of the speech in issue is always the central aspect" in making the public concern determination. *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75 (4th Cir. 1988). A plethora of courts have held that speech relating to the conduct and performance of public agencies, especially law enforcement agencies, is of utmost public concern and is among the most protected forms of any kind of speech.[1]

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[1] E.g., *Biggs v. Village of Dupo*, 892 F.2d 1298, 1301-02 (7th Cir. 1990)(employee's interview with press discussing lack of agency funding protected); *Manhatten Beach Police Ass'n v. City of Manhatten Beach*, 881 F.2d 816 (9th Cir. 1989)(police officer's letter critical of manpower shortage held protected); *Rode v. Dellarciprete*, 845 F.2d 1195 (3rd Cir. 1988)(public employee's interview with reporter alleging racial harassment of her held protected); *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988)(public employee's statements to press regarding employment discrimination held protected); *O'Donnell v. Yanchulis*, 875 F.2d 1059 (3rd Cir. 1989)

As demonstrated in *Bryson v. Waycross*, 888 F.2d 1562, 1566 (11th Cir. 1989), "a core concern of the first amendment is the protection of the 'whistleblower' attempting to expose government corruption". A police officer's perception of potential graft and corruption is deserving of vigilant protection by the First Amendment.

Numerous cases make clear that speech by a law enforcement officer reporting malfeasance, corruption or inefficiency are of paramount public concern and are protected. E.g., *Walter v. Morton*, 33 F.3d 1240, 1242-43 (10th Cir. 1994)(statements of perceived illegal activities of chief of police are matter of public concern for community); *Brawner v. City of Richardson*, 855 F.2d 187 (5th Cir. 1988)(letter alleging police departmental improprieties held protected); *Murphy v. City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986)(public obviously concerned with how a police department is operated); *Bricknell v. Norton*, 732 F.2d 664 (8th Cir. 1984)(public has a "vital interest" in police department); *Soleman v. Royal Oak Township*, 842 F.2d 862 (6th Cir. 1988)(police officer's statements alleging departmental improprieties held of public concern and protected); *O'Brien v. Town of Caldonia*, 748 F.2d 403, 407 (7th Cir. 1984)( police officer's communications alleging departmental problems "is deserving of vigilant protection by the First Amendment.")

The most recent cases underscore the settled rules from the foregoing law enforcement free speech cases. E.g., *Orange v. District of Columbia*, 59 F.3d 1267, 1272-73 (D.C. Cir. 1995)(examining potential fraud at a public university involves matters of interest to the community, seeking to "bring to light actual or potential wrongdoing or breach of public trust."); *Patrick v. Miller*, 953 F.2d 1240, 1247 (10th Cir. 1992)(perceived illegalities in City's budgeting activities constituted topic of "inherent" public concern). In *Watters v. City*, 55 F.3d 886, 891 (3rd Cir. 1995), the Third Circuit reversed summary judgment for an em-

ployer in a free speech case where the police department employee, the director of the employee assistance program, made comments about how the "lack of official policies caused problems..." Even far less serious communications about problems in police departments merit protection. See *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992)(complaints about sex harassment within police agency are of public concern). "[P]ublic awareness and criticism have even greater importance where, as here, they concern allegations of police corruption." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

As the court in the seminal case of *Brukiewa v. Police Comm.*, 263 A.2d 210 (Md. 1970) explained: " There can be no doubt that a policeman has full First Amendment rights," 263 A.2d at 218, citing *Garrity v. N.J.*, 385 U.S. 493, 500 (1967)("Policemen, like teachers and lawyers, are not relegated to some watered down version of constitutional rights.") Accord *Wood v. Georgia*, 370 U.S. 375 (1962)(statement by Sheriff raising issues of racial agitation by judge held protected speech).

As the dissent amply demonstrates, this Court's analysis in *Connick v. Myers* demonstrates that there is a sliding scale of protection dependent in part upon the degree of public concern of the speech. The dissent also spells out the fact that numerous circuit courts afford protection for employee speech about corruption and illegality, regardless of motivation. See dissent, slip op. at 20.

**Connick is Distinguishable On Several Grounds**

*Connick* involved an assistant district attorney, Shelia Myers, who engaged in insubordinate behavior causing actual disruption within the District Attorney's office. In *Connick*, Myers was confronted with a job transfer and this action was personal and unique to her, as contrasted with broader personnel issues that may have affected the entire

agency. After Myers was informed of the transfer, which she strongly opposed, she responded by preparing an employee survey which was distributed while on the job. Myers' survey also contained statements questioning the integrity of her own superiors. Distribution of this survey while on the job caused a "mini-insurrection" within the office. *Id.* at 141.

*Connick* emphasized that "a stronger showing [of disruption] may be necessary if the employee's speech more substantially involved public concern. " 461 U.S. at 152. This "stronger showing" of disruption is applicable here because Petitioner's conduct involved the type of substantial public concern that *Connick* envisioned. This in fact is born out in circuit cases construing *Connick* as substantial actual disruption is required in cases where the public concern is particularly strong.

"The nature of the government's burden to show disruption, moreover, varies with the content of the speech." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992)(employee's memo criticizing her own employing agency's director and problems within the agency held to constitute a matter of public concern and protected). "The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* The disruption to be proven by the employer must be "actual, material and substantial ..." *Id* at 1140, citing numerous cases. Disruption must be "real [and] not imagined." *But cf. Tyler v. City of Mountain Home*, 72 F.3d 568 (8th Cir. 1995)(demonstrating how circuit courts analyze disruption with different standards). The circuit courts are equally split on disruption standards and how to factor disruption into the balancing test. *Cf. Hyland, supra., Tyler, supra., O'Donnell, supra.*

## CONCLUSION

WHEREFORE, Amicus Curiae Southern States Police Benevolent Association respectfully urges this Court to grant the Petition, and reverse the decision of the Fourth Circuit.

J. Michael McGuinness*
McGuinness & Parlagreco
236 North Poplar Street
P.O. Box 952
Elizabethtown, N.C. 28337
910-862-7087
* Counsel of Record

## CERTIFICATE OF SERVICE

I hereby certify that I have had the foregoing motion and brief served upon counsel of record for Petitioner and Respondent, through their counsel, A.W. Vandermeer, Jr., Clark & Stant, P.C., One Columbus Center, Virginia Beach, VA 23462 and L. Steven Emmert, City Attorney's Office for the City of Virginia Beach, City Hall, Virginia Beach, VA 23456.

J. Michael McGuinness
Member, Supreme Court Bar